IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

RSA.No. 383 of 2004()

AS.25/1994 of PRINCIPAL SUB COURT,ATTINGAL
OS.231/1988 of MUNSIFF COURT,ATTINGAL

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APPELLANT/APPELLANT/PLAINTIFF:

RADHA, D/O. PARVATHY,
ANITHA VILASOM, MANALAKAM, THATCHAPPALLI MURI,
KEEZHTHONNAKKAL VILLAGE.

BY ADV. SRI.BASANT BALAJI
SMT.K.KUSUMAM

RESPONDENTS:RESPONDENTS/ DEFENDANTS:

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1. SUKUMARAN, S/O. AYYAN, BLOCK NO.50,
HARIJAN COLONY, THONNAKKAL,
KEEZHTHONNAKKAL VILLAGE.

2. KERALA STATE, REP. BY ITS
CHIEF SECRETARY, SECRETARIAT, TRIVANDRUM.

3. THE DISTRICT COLLECTOR, TRIVANDRUM.

4. THE SPECIAL OFFICER, SCHEME OF
THONNAKKAL COLONIZATION, KUDAVOOR P.O.

5. SASIDHARAN, ANITHA VILASOM,
THATCHAPPALLI MURI, KEEZHTHONNAKKAL VILLAGE,
RESIDING AT P.B.1602, AL-AIN, ABUDHABI, UAE.(DELETED)

BY ADV. SRI.R.S.KALKURA FOR R1

BY SPECIAL GOVERNMENT PLEADER SRI.P.SANTHOSHKUMAR FOR R2 TO R4

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 29/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 383 OF 2004

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Dated this the 29th day of November, 2007

JUDGMENT

Plaintiff in O.S.231/1988 on the file of Munsiff Court, Attingal is the appellant. Defendants are the respondents. Appellant instituted the suit seeking a decree for declaration of her title and permanent prohibitory injunction. The case of appellant was that item No.1 of the plaint schedule property, which is 18 cents, and part of 87 cents was obtained by Bhagavathy Karthiyani as per sale deed of 1106 M.E and Bhagavathy Karthiyani thereafter entered into a partition deed in 1123 M.E and as per that partition deed, properties were divided and as item No.1 of plaint A schedule property, 18 cents was allotted to the share of Gangadharan alias Chellappan who was the second executant and he effected mutation and was paying tax and was in possession of the property and after his death, his

legal heirs sold the property in favour of appellant and fifth respondent in 1972 and they have been in possession of property effecting mutation and item No.2 of plaint schedule property which is 2 cents was purchased by appellant and fifth respondent as per sale deed from Dakshayani Kamalamma who was a party to the partition deed and Bhagavathy Karthiyani got right as per sale deed 1403/1968 and appellant and fifth respondent are in possession and enjoyment of plaint schedule items 1 and 2 properties having a total extent of 20 cents and this property is lying as a single compact plot and on the western side of the property is Vengode Kattiyad road and adjacent to the property there is puthuval land and this land was assigned in favour of the predecessors of appellant and fifth respondent in 1121 M.E and this fact was also stated in the partition deed of 1123 M.E and first respondent has influenced Thonnakkal Harijan Colonisation Society and fourth respondent created false documents and under the guise of false

documents trespassed into the plaint schedule property and attempted to construct a fencing and appellant therefore filed O.S. 261/1984 and in that suit, Society raised a contention that Society is having no right over the plaint schedule property and plaint schedule property is a Government puramboke land and hence suit was withdrawn with liberty to file a fresh suit and thereafter appellant sent a notice under section 80 of Code of Civil Procedure and inspite of receipt of notice respondents 2 to 4 did not sent a reply. Fifth respondent and appellant alone are having right over the plaint schedule property and respondents have no manner of right over the plaint schedule property and they have no right to construct a fencing. As fifth respondent is employed in Gulf, he could not be joined as a plaintiff and so impleaded as a defendant in the suit. Appellant sought a declaration of her title and possession and permanent prohibitory injunction restraining respondents from trespassing

into plaint schedule property. First respondent in his written statement contended that appellant or fifth respondent has no title to the plaint schedule properties and as per the document she has title only to the property in survey No.37/17/1. It is contended that appellant has also scheduled the property in survey No.37/17 over which she has no right and property is to be located through a Commissioner. It was also contended that plaint schedule property was not assigned to the predecessors of the appellant and if the properties are assigned a sketch will be prepared. The properties which are assigned to the Harijan Colony at Thonnakkal originally was a forest land and after giving notice to the adjacent property owners land was measured and boundaries were fixed and survey stones were laid and the property was assigned and if at all appellant or fifth respondent had any objection, it should have been raised at that time. It was further contended that Block No.50 in the Harijan Colony was

alloted to first respondent and this property is in survey No.4/10/44 of Thonnakkal Village and first respondent got altogether 1 acre and 50 cents out of which 56 cents is in survey No.164/1/24/1 and the entire property is enclosed by fencing and appellant and one Bhasurangi filed application before Thonnakkal Harijan Colonisation Officer on 23.8.1984 stating that a pathway is to be provided to them to their property in survey No.31/17/5 and survey No.17/6. Therefore a pathway was so provided and on the northern side of the property of first respondent and excluding that pathway fencing was put up and appellant has no right over the property included in the fence and suit is only to be dismissed. Respondents 2 to 4 filed a joint written statement contending that plaint schedule property is not in the possession of appellant or fifth respondent and there is survey stones and fencing separating plaint schedule property from the remaining property of appellant. It is admitted that Vengodu-Kattiyadu road is on

the western side of plaint schedule property and this property belong to first respondent and it was not assigned to the appellant or fifth respondent and plaint schedule property was a Government land and was in the possesison and control of Special Officer, Thonnakkal Harijan Colonisation Scheme and appellant or fifth respondent has no right or title or possession to the property and suit is to be dismissed. Appellant thereafter filed a replication contending that plaint schedule property has been in the uninterrupted undisputed and absolute possession and enjoyment of appellant and fifth respondent and property assigned in favour of predecessors of appellant and fifth respondent is patta No.2375 and Special officer of the Colony has neither any control nor possession of plaint schedule property and report of the Commissioner in the earlier suit O.S.261/1984 shows that respondents trespassed into the plaint schedule property a week prior to the inspection and even if it is found that there is some property

which is puthuval land then title of the Government is lost by adverse possession and limitation and therefore appellant is entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 to 4, DW1 and Exts.A1 to A5, B1 and B2 and C1 and C1 (a) dismissed the suit holding that appellant did not establish the title or possession to the plaint schedule property. It was found that Ext.C1 report and C1(a) plan, with the evidence of Commissioner, show that plaint schedule properties were not identified as the property belonging to appellant under Ext.A1 and Ext.A2 and therefore appellant is not entitled to the decree sought for. Appellant challenged the judgment before Sub Court, Attingal in A.S.25/1994. Learned Sub Judge on reappreciation of evidence found that appellant did not succeed in establishing that plaint schedule property is the property covered under Ext.A1 and A2 and confirming the findings of learned Munsiff, dismissed the appeal. It is challenged in the

second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that courts below did not properly appreciate the evidence and should not have relied on Ext.C1 and C1(a) and instead should have relied on Ext.A5 report submitted by the Commissioner in the earlier suit O.S.261/1984 which had withdrawn with liberty to file fresh suit and Ext.A5 report would establish that plaint schedule property is the property covered under Exts.A1 and A2. Learned counsel argued that the boundaries of plaint schedule property as noted by the Commissioner in Ext.A5 report tally with the boundaries covered under Exts.A1 and A2 and therefore courts below should have found that identity of plaint schedule properties is established. Learned counsel also argued that respondents 2 to 4 in their written statement did not raise specific contention with regard to the identity of plaint schedule property

and in such circumstance, courts below should not have non-suited appellant on that ground. Learned counsel also argued that courts below relied on evidence of the

Commissioner and omitted to take note of the fact that appellant had taken out the Commission and had made every effort to get the property identified and only after the failure of Taluk Surveyor to identify the property, assistance of a retired Surveyor was sought and in such circumstance, courts below should have granted the decree sought for.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. The suit is for declaration of title and possession and injunction. Ext.C1 report submitted by the Commissioner establish that the disputed property was enclosed by fencing by first respondent. The argument is that when O.S.261/1984 was filed, Commissioner inspected the property and

Ext.A5 report submitted by the Commissioner at that time show that fencing was made only just prior to the institution of that suit. But that suit was withdrawn and the present suit was instituted subsequently in 1988 and report submitted by the Commissioner establish that plaint B schedule property was not in the possesison of appellant but in the possession of first respondent. In such circumstance, appellant cannot claim a decree for declaration of his possession.

7. Appellant is claiming right, title and possession under Ext.A1 and A2. The title to the plaint schedule property could be upheld only on establishing that plaint schedule properties are the properties covered under Ext.A1 and A2. Courts below on the evidence found that appellant has not etablished the identity and therefore appellant is not entitled to the decree sought for. That factual finding cannot be interfered by reappreciating the evidence in exercise of the powers of this court under section 100 of Code of

Civil Procedure. Reappreciation of evidence is warranted only if the appreciation of evidence was perverse. On going through the judgment of courts below, I do not find that appreciation of evidence was perverse. In such circumstance, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006